(1)

No. 91-1844

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

WAYNE SNOW, JR., Chairman, Georgia State Board of Pardons and Paroles,

Petitioner,

v.

ISAAC GRAHAM,

Respondent.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) The Eleventh Circuit erred in relying on *Akins v. Snow*, 922 F.2d 1558 (11th Cir. 1991) which applies the "substantial disadvantage" standard for testing whether a regulation violates the ex post facto clause when this standard was expressly overruled by the Supreme Court in *Collins v. Youngblood*, 497 U.S. ___, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990).

(2) A parole regulation changing the time for an inmate's parole reconsideration hearing is not a "law" subject to the ex post facto provision of the U.S. Constitution.

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No. _____

In The

Supreme Court of the United States

October Term, 1991

WAYNE SNOW, JR., Chairman, Georgia State Board of Pardons and Paroles,

Petitioner,

v.

ISAAC GRAHAM,

Respondent.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Wayne Snow, Jr., Chairman of the Georgia Board of Pardons and Paroles, respectfully prays the Writ of Certiorari issue to review the judgment of the Eleventh Circuit Court of Appeals entered on April 2, 1992.

OPINIONS BELOW

The original panel decision of the Eleventh Circuit Court of Appeals was reported in *Graham v. Snow,* No. 90-8660 (11th Cir. 1992). A copy of that opinion is included as Appendix A. The Petition for Rehearing and

Suggestion of Rehearing En Banc was denied on April 2, 1992 and is included as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on April 2, 1992. This Petition for Writ of Certiorari has been filed within the allowable ninety days from that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

U.S. Const., Art. I, Sec. X, Cl. I.

"No State shall . . . pass any . . . ex post facto law. . . . "

STATEMENT OF THE CASE

Plaintiff commenced this action on November 6, 1989, by filing a complaint pro se in the United States District Court for the Southern District of Georgia. Among other things, Plaintiff averred that the application to him of revised rules regarding the time for reconsideration for parole constituted an ex post facto law. The action was transferred to the United States District Court for the Northern District of Georgia and Defendants were duly served.

On February 9, 1990, Defendants moved under Fed. R. Civ. P. 12 to dismiss the complaint. In an order entered

June 25, 1990, the action was dismissed. However, this order preceded the recent Eleventh Circuit decision of *Akins v. Snow*, 922 F.2d 1558 (11th Cir. 1991).

Plaintiff appealed the dismissal of this action. By Order of the United States Court of Appeals of the Eleventh Circuit, Plaintiff was appointed counsel. This matter was briefed and orally argued before the Eleventh Circuit. In the interim between the dismissal of the suit in the district court and briefs in the Eleventh Circuit, the case of *Akins v. Snow* was decided. *Adkins* was binding on the Eleventh Circuit panel and is indistinguishable from the present case. Based on *Akins*, the panel reversed the decision of the district court below dismissing Plaintiff's case. The panel appropriately affirmed the decision dismissing Plaintiff's claims for damages. The Defendants petitioned for rehearing en banc on February 28, 1992. The Petition for Rehearing and Suggestion of Rehearing En Banc was denied on April 2, 1992.

REASONS FOR GRANTING THE WRIT

A. THE ELEVENTH CIRCUIT ERRED IN RELYING UPON *AKINS V. SNOW*, 922 F.2d 1558 (11th Cir. 1991), WHICH APPLIES THE "SUBSTANTIAL DISADVANTAGE" STANDARD FOR TESTING WHETHER A REGULATION VIOLATES THE EX POST FACTO CLAUSE SINCE THIS STANDARD WAS EXPRESSLY OVERRULED BY THE SUPREME COURT IN *COLLINS V. YOUNGBLOOD*, 497 U.S. ___, 110 S.CT. 2715, 111 L.Ed.2d 30 (1990).

Defendants urged the court below that *Akins v. Snow*, 922 F.2d 1558 (11th Cir. 1991) was wrongly decided. The

Akins court did not consider the recent decision of the Supreme Court in *Collins v. Youngblood, supra*. In light of this Supreme Court decision, *Akins* is clearly wrongly decided. In *Collins*, this Court explained that the ex post facto provision had been expanded by various district courts beyond the realms required in the Constitution. In an effort to limit the restrictions of the ex post facto clause, the Court defined the parameters of the definition of an ex post facto law. In order to come within the provisions of the ex post facto clause, a change in a law must: (1) punish as a crime an act previously committed which was innocent when done; (2) make more burdensome the punishment for a crime, after its commission; or (3) deprive one charged with a crime of any defense previously available at the time the act was committed. *Id.* at ___, 110 S.Ct. at 2719.

This Court expressly overruled prior cases which had expanded the ex post facto clause to include laws which deprive a defendant of a "substantial protection" under the law. *Id.* at ___, 110 S.Ct. at 2721-22. The standard overruled in *Collins* is the exact standard applied in the *Akins* decision by the Eleventh Circuit and again in the present case. The *Akins* panel found that a law increases a criminal defendant's punishment if it "disadvantage[s] the offender affected by it." The court held that the Board's change in the time for reconsideration for parole increases his punishment by substantially disadvantaging his opportunity for parole. The same holding was made in the present case in light of *Akins*. However, in *Collins*, this Court held that a law does not increase punishment simply by "substantially disadvantaging" the criminal

defendant. *Id.* The law must, in fact, be an increase in punishment or sentence. *Id.*

Respondent Graham, like the inmate in *Akins*, has not had an increase in punishment by a set-off in the time period between reconsiderations. Parole has always been a matter of complete discretion with the Parole Board. *Slocum v. Georgia State Board of Pardons and Paroles*, 678 F.2d 940 (11th Cir. 1982). This Court has never held that parole eligibility is a part of the prisoner's sentence subject to the prohibitions of the ex post facto clause. *Collins, supra.* In *Greenholtz v. Inmates of Nebraska*, 441 U.S. 1316, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979), it was held that in a state where parole rests in the discretion of the parole board, an inmate has no due process entitlement. A reasonable entitlement to due process is not created merely because a state provides for the possibility of parole. Such a possibility provides no more than a mere hope that the benefit will be obtained. *Id.* Plaintiff's hope in the possibility of parole following his conviction has not changed. The Parole Board has not increased his punishment by changing the time before he will be automatically reconsidered. Even assuming Plaintiff was "substantially disadvantaged," which he is not, this does not increase his punishment, or subject the change in the Parole Board rules to the provisions of the ex post facto clause. *Collins, supra.*

Also, the present case cannot be distinguished from the holdings in the Eleventh Circuit decision in *Damiano v. Florida Parole and Probation Commission*, 785 F.2d 929 (11th Cir. 1986) and this Court's decision of *Greenholtz*. In *Damiano*, an inmate argued that the retroactive use of parole guidelines which extended his tentative parole

release date violated the ex post facto clause. There, the court reasoned that because the matter of parole had always been in the complete discretion of the parole board, an extension of a parole date did not violate the ex post facto clause.

In summary, *Akins* and the present case should be overruled in order to align this case with the precedent of the United States Supreme Court. The Eleventh Circuit should not have applied the substantial disadvantage test but should have considered whether punishment was increased as a result of the change in the Board's regulation. Because parole has always been a matter within the complete discretion of the Parole Board, and there has never been more than a hope for parole, an inmate is not punished by the Board's refusal to reconsider him sooner. *See also Slocum v. Georgia State Board of Pardons & Paroles*, 678 F.2d 940 (11th Cir. 1982) (a prisoner does not have a protectable expectation of conditional release which would entitle him to due process in his consideration for parole and the decision whether to release an inmate on parole is a matter committed to the discretion of the Parole Board).

B. A PAROLE REGULATION EXTENDING THE TIME FOR AN INMATE'S PAROLE RECONSIDERATION REVIEW IS NOT A "LAW" SUBJECT TO THE EX POST FACTO PROVISIONS OF THE UNITED STATES CONSTITUTION.

The *Akins* panel, prior to determining whether the change in the regulation amounted to an increase of punishment first questioned whether the ex post facto

clause should apply to a change in the Parole Board regulations. The *Akins* holding that a change in the Parole Board regulations is a law subject to the ex post facto clause is contrary to the majority of decisions in other circuits. *See, Bailey v. Gardebring*, 940 F.2d 1150 (8th Cir. 1991).[1] In *Bailey*, the court considered whether a change in the parole board regulations of Minnesota amounted to a loss subject to the ex post facto clause. The parole board, like the Georgia Parole Board, was vested with complete discretionary authority to grant or deny parole by the state legislature. In addition, the legislature commanded that the Parole Board issue specific regulations governing the procedures by which parole would be granted. The Court held that internal regulations governing the exercise of the power to grant or deny parole were not laws within the meaning of the ex post facto clause. Citing numerous authorities, the Court found that a majority of circuit courts agreed with this conclusion. It noted that *Akins* was an exception to this rule. *Id.*, 940

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[1] In *Bailey v. Gardebring*, 940 F.2d 1150 (8th Cir. 1991), the court recognized that the majority of courts agreed a state paroling authority's regulations are not subject to the ex post facto prohibition. *See Resnick v. United States Parole Commission*, 835 F.2d 1297, 1301 (10th Cir. 1987); *Vermouth v. Corrothers*, 827 F.2d 599, 604 (9th Cir. 1987); *Sheary v. United States Parole Commission*, 822 F.2d 556, 558 (5th Cir. 1987); *Prater v. United States Parole Commission*, 802 F.2d 948, 952-54 (7th Cir. 1986); *DiNapoli v. Northeast Regional Parole Commission*, 764 F.2d 143, 146-47 (2nd Cir.), *cert. denied*, 474 U.S. 1020, 106 S.Ct. 568, 88 L.Ed.2d 553 (1985); *Warren v. United State Parole Commission*, 659 F.2d 183, 193-97 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 950, 102 S.Ct. 1454, 71 L.Ed.2d 665 (1982); and *Ruip v. United States*, 555 F.2d 1331, 1335-36 (6th Cir. 1977).

F.2d at 1157. The court in *Bailey* found that because parole regulations were not laws for ex post facto purposes, summary judgment was appropriate on the ex post facto claim.

The "law" in effect at the time of Respondent's illegal acts was that the parole board was free to parole any inmate. The parole "law" in effect now is still the same. The regulations issued within the realm of exercising that discretionary power should not be viewed as laws for purposes of the ex post facto clause. *See also Francis v. Fox*, 838 F.2d 1147 (11th Cir. 1988) (a state work release regulation issued pursuant to a statutory grant of discretionary power to the Department of Corrections is not an ex post facto "law").

It is clear in *Akins* and the present case, Plaintiff has not lost the possibility of being paroled merely because the set-off date for reconsideration review has been increased. An informal review of a case can be conducted at any time when exceptional circumstances are brought before the Board. A change in the reconsideration date does not limit the discretionary power to grant or deny parole by the Board. The Board merely made an administrative decision that parole reconsideration reviews need not be conducted as frequently. The Parole Board in exercising its discretion, determined that life sentenced inmates were not regularly going to be given parole until after they had served at least 15 years of their sentence.

CONCLUSION

For the above and foregoing reasons, Petitioner prays that this Court grant a Writ of Certiorari to review the decisions of the Eleventh Circuit Court of Appeals as the Eleventh Circuit Court of Appeals ignored the precedent of this Court and ruled erroneously.

Respectfully submitted,

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APPENDIX A

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8660

D.C. Docket No. 1:89-CV-2569-JTC

ISAAC GRAHAM,

Plaintiff-Appellant,

versus

WAYNE SNOW, JR., JAMES T. MORRIS, MOBLEY HOWELL, MICHAEL H. WING, and BETTY O. HUTCHINSON, Members of the State Board of Pardons and Paroles,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(February 7, 1992)

Before KRAVITCH and BIRCH, Circuit Judges, and Kaufman*, Senior District Judge.

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*Honorable Frank A. Kaufman, Senior U. S. District Judge for the District of Maryland, sitting by designation.

PER CURIAM:

Isaac Graham filed a claim under 42 U.S.C. § 1983 against the members of the Georgia State Board of Pardons and Paroles ("Board"), in both their official and individual capacities, for violation of the Ex Post Facto Clause of the United States Constitution, seeking injunctive relief and monetary damages. The district court dismissed the suit for failure to state a claim upon which relief may be granted. We reverse.

I. FACTS

Graham, an inmate in the Georgia state prison system, was convicted of murder and sentenced to life imprisonment in 1970. At that time, the Georgia State Board of Pardons and Paroles Rule ("Rule") 475-3-.06 provided that a person serving a life sentence would be eligible for parole consideration after seven years. Rule 475-3-.05(2) provided that if parole were denied, the prisoner would be eligible for reconsideration annually. A 1985 amendment to Rule 475-3-.05(2) extended the time for reconsideration to every eight years.

In his complaint, Graham asserts that he was denied parole in 1984 and informed that he would be reconsidered in eight years. Graham argues that he should be considered for parole according to the laws in effect at the time of his sentence, which provided for reconsideration annually, and that application of the new rule violates the Ex Post Facto Clause, U.S. Constitution, Article I, § 10, Cl. 1.

II. DISCUSSION

The Supreme Court has held that a law violates the Ex Post Facto Clause if it (1) is retrospective, in the sense that it applies to events occurring before its enactment, and (2) disadvantages the offender affected by it. *Weaver v. Graham*, 450 U.S. 24, 29 (1981). The district court dismissed Graham's complaint, holding that

> the Georgia parole scheme has been at all times and remains a matter of discretion with the State Board of Pardons and Paroles. Thus, the new statutory parole guidelines do not subject plaintiff to more onerous treatment. Accordingly, any modification in the method to determine plaintiff's parole eligibility does not violate the ex post facto clause.

District Court Order, at 2.

Subsequent to the district court's ruling, however, this court decided *Akins v. Snow*, 922 F.2d 1558 (11th Cir. 1991) and expressly rejected the rationale that underlay the district court's opinion in this case. This court reasoned that because the Georgia legislature delegated to the Board the power to enact rules and regulations concerning parole reconsideration that have the force and effect of law, the Board's rules or regulations are subject to the *ex post facto* prohibition. *Akins*, 922 F.2d at 1561. In applying the Supreme Court's *Weaver* analysis, the *Akins* court held that the amendments to the rules regarding parole eligibility were retrospective because they altered the consequences of their crimes after they were complete and that they disadvantaged the prisoner by reducing his opportunity for parole. *Id.* Thus, retroactive application

of a rule that changed the period between parole reconsideration hearings amounted to a violation of the Ex Post Facto Clause. The State conceded in a supplemental brief and at oral argument that *Akins* controls this case. As in *Akins*, Graham is entitled to annual parole reconsideration as provided for by the Board rules in effect when he was sentenced.

Graham's claim for monetary damages, however, must be dismissed. Graham's action for damages against members of the Board in their official capacity is barred by Eleventh Amendment sovereign immunity. *Monell v. Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018 (1978). Board members are also protected individually by qualified, or "good faith" immunity because, prior to *Akins*, the law was not clearly established that retroactive application of Board rules was a violation of the Ex Post Facto Clause. *See Harlow v. Fitzgerald*, 457 U.S. 800, 1092 S.Ct. 2727 (1982); *Rich v. Dollar*, 841 F.2d 1558 (11th Cir. 1988).

III. CONCLUSION

We REVERSE the district court's dismissal for failure to state a claim upon which relief may be granted and REMAND the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX B

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8660

ISAAC GRAHAM,

Plaintiff-Appellant,

versus

WAYNE SNOW, JR., JAMES T. MORRIS, MOBLEY HOWELL, MICHAEL H. WING, and BETTY O. HUTCHINSON, Members of the State Board of Pardons and Paroles,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

(Filed Apr. 2, 1992)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion February 7, 1992, 11th Cir., 19___, _____F.2d_____).

Before: KRAVITCH and BIRCH, Circuit Judges, and KAUFMAN*, Senior District Judge.

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*Hon. Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

(2)

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Petitioner,

v.

ISAAC GRAHAM,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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STATEMENT OF THE CASE

By order of the Honorable J. L. Edmondson, Judge, United States Court of Appeals for the Eleventh Circuit, dated April 19, 1991, the undersigned, R. Scott Tewes, was appointed as counsel for Respondent, Isaac Graham, pursuant to Eleventh Circuit Addendum 5 to file a supplemental brief on his behalf, to present oral arguments, and to represent him in further proceedings before that Court. Respondent was granted leave to proceed *in forma pauperis* by the United States Court of Appeals for the Eleventh Circuit.

The Petitioner's Statement of the Case outlines the general history of the case. The additional facts contained in the opinion below, *Graham v. Snow,* No. 90-8660 (11th Cir. 1992) (Petitioner's Appendix A), are incorporated by reference.

REASONS FOR DENYING THE WRIT

A. THE QUESTIONS PRESENTED BY THE PETITIONER WERE NOT FULLY BRIEFED AND ARGUED BELOW.

This case is inappropriate for certiorari because the Petitioner did not fully brief and argue before the Eleventh Circuit panel the questions presented here. The cornerstone of Petitioner's argument before this Court is that *Akins v. Snow,* 922 F.2d 1558 (11th Cir. 1991), the case principally relied upon by the Eleventh Circuit panel in deciding *Graham,* is inconsistent with this Court's decision in *Collins v. Youngblood,* 110 S. Ct. 2715 (1990). Yet in

his principal brief in the Eleventh Circuit, Petitioner made only a passing reference to *Collins:* "In fact, the *Akins* decision is contrary to the recent Supreme Court decision of *Collins v. Youngblood,* 497 U.S. ___, 110 S. Ct. 2715 (1990), which defined the parameters of the ex post facto clause so as to exclude parol eligibility from its scope." Brief of Appellees at 8, *Graham v. Snow,* No. 90-8660 (11th Cir. 1992). In its "Statement of the Issues" below, Respondent not only failed to raise any inconsistency between *Akins* and *Collins,* but stated that, in light of *Akins,* there was nothing to argue:

> There are no issues before this Court, Defendants concede that this case is controlled by the recent Eleventh Circuit decision in *Akins v. Snow,* 922 F.2d 1558 (11th Cir. 1991).

Id. at 2. Consequently, the panel observed that "[t]he State conceded in a supplemental brief and at oral argument that *Akins* controls this case." *Graham v. Snow,* No. 90-8660 (11th Cir. 1992) (Petitioner's Appendix A at 4a).

Petitioner first briefed the questions presented for review by this Court in its Petition for Rehearing. Petition for Rehearing at Suggestion of Rehearing En Banc on Behalf of Appellees, *Graham v. Snow,* No. 90-8660. The Eleventh Circuit was not required to address issues presented for the first time in a petition for rehearing. *Holly v. Seminole County School Dist.,* 763 F.2d 399, 400-01 (11th Cir. 1985); *accord Browning v. Navarro,* 894 F.2d 99, 100 (5th Cir. 1990).

This Court should not exercise its discretion to review the decision of a panel before which the questions

now raised were never fully presented. *Youakim v. Miller,* 425 U.S. 231, 234 (1976).

B. THIS COURT RECENTLY HAS DECLINED TO REVIEW BOTH ISSUES ADVANCED BY PETITIONER.

The Petition for Writ of Certiorari should be denied because this Court recently has declined to review both issues advanced by Petitioner. This case presents nothing new to warrant review of those issues now.

Petitioner first argues that the Eleventh Circuit erred in relying on *Akins v. Snow,* 922 F.2d 1558 (11th Cir. 1991), because the Supreme Court in *Collins v. Youngblood,* 110 S. Ct. 2715 (1990), expressly overruled the standard used in *Akins* to determine whether the rule at issue violated the ex post facto clause of the United States Constitution. Petitioner made the same argument in a petition for writ of certiorari in June 1991 following the Eleventh Circuit's decision in *Akins.* This Court appropriately denied the petition. *Akins v. Snow,* 111 S. Ct. 2915 (1991).

Petitioner next argues that a parole board rule that fixes the time for an inmate's parole reconsideration review is not a "law" subject to the ex post facto clause of the United States Constitution. Petitioner relies on *Bailey v. Gardebring,* 940 F.2d 1150 (8th Cir. 1991), in an attempt to show a conflict among the circuits on this issue. In March 1992, this Court denied a petition for writ of certiorari to review *Bailey* and its interpretation of what is a "law" within the meaning of the ex post facto clause. *Bailey v. Noot,* 112 S. Ct. 1516 (1992). The asserted conflict with *Akins'* interpretation of the meaning of the term

"law" as used in the ex post facto clause existed when the Court denied certiorari in *Bailey;* therefore, the Eleventh Circuit's decision in this case presents nothing new for the Court to decide.

In short, none of the facts or circumstances of this case make it more appropriate for review by this Court than *Akins* or *Bailey.*

C. THE DECISION OF THE ELEVENTH CIRCUIT IS CONSISTENT WITH *COLLINS V. YOUNGBLOOD,* OTHER DECISIONS OF THIS COURT, AND THE DECISIONS OF OTHER CIRCUIT COURTS.

In *Collins v. Youngblood,* 110 S. Ct. at 2719, this Court reaffirmed the understanding of the ex post facto clause set forth in *Calder v. Bull,* 3 Dall. 386 (1798). The ex post facto clause is violated by "every law that *changes the punishment,* and inflicts a *greater punishment,* than the law annexed to the crime, when committed." *Id.* at 390.

There is no dispute that when Respondent committed the crimes for which he was convicted, the rules of the Georgia State Board of Pardons and Paroles (the "Board") provided that prisoners serving life sentences would be eligible to be considered for parole after seven years and, if denied, reconsidered annually thereafter. In 1985 the rule on eligibility for reconsideration was changed to the substantial detriment of Respondent. When he committed the crimes for which he received life sentences, the Board was required to reconsider him for parole annually after an initial denial. Now the Board is required to consider

him no more frequently than every eight years. Respondent has made no claim of a right to parole or a "liberty interest" in parole. His position, and that of the Eleventh Circuit, is that the 1985 change in the Board's rule on eligibility for reconsideration after an initial denial was a substantial increase in his punishment.

It has long been accepted that parole eligibility may be considered part of the punishment for a crime and that retrospective changes in parole eligibility rules make punishment more burdensome in violation of the ex post facto clause. In *Warden, Lewisburg Penitentiary v. Marrero,* 417 U.S. 653, 658 (1974), this Court stated:

> Although, of course, the precise time at which the offender becomes eligible for parole is not part of the sentence . . . , it is implicit in the terms of the sentence. And because it could not be seriously argued that sentencing decisions are made without regard to the period of time a defendant must spend in prison before becoming eligible for parole, or that such decisions would not be drastically affected by a substantial change in the proportion of the sentence required to be served before becoming eligible, parole eligibility can be properly viewed as being determined – and deliberately so – by the sentence of the District Judge.

In dictum this Court went on to state that "a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the ex post facto clause . . . of whether it imposed a 'greater or more severe punishment than was prescribed by law at the time of the . . . offense.' " 417 U.S. at 663 (quoting *Rooney v. North Dakota,* 196 U.S. 319, 325 (1905)).

Numerous circuit courts addressing changes in parole eligibility have concluded that such changes amount to an increase in punishment. *See Schwartz v. Muncy*, 834 F.2d 396, 398 (4th Cir. 1987) ("The fixing of his parole eligibility date, which was part of his punishment, could not constitutionally be made 'greater or more severe.' "); *Burnside v. White*, 760 F.2d 217, 220 (6th Cir. 1985) ("There is no question that a new parole statute may alter the consequences attached to a crime for which a prisoner has already been sentenced; to the degree that a statute does so, it has retrospective effect."); *Rodriguez v. United States Parole Comm'n*, 594 F.2d 170 (7th Cir. 1979) (change in parole review increasing time before which prisoner could be considered for review violated ex post facto clause); *Shepard v. Taylor*, 556 F.2d 648, 654 (2d Cir. 1977) ("Since parole eligibility is considered an integral part of any sentence, official post-sentence action that delays eligibility for supervised release runs afoul of the ex post facto proscription."); *see also Lindsay v. Washington*, 301 U.S. 397, 401 (1937); *Beebe v. Phelps*, 650 F.2d 774, 775 (5th Cir. 1981).

Fender v. Thompson, 883 F.2d 303 (4th Cir. 1989), also emphasizes the constitutional significance of a change in eligibility for parole regardless of whether granting parole is totally discretionary. As in this case, Fender did not argue whether he should or should not be paroled, but simply challenged the denial of his right to eligibility for parole consideration. The Fourth Circuit found an ex post facto clause violation because "the retrospective application of a statute modifying or revoking parole eligibility would ' . . . substantially alter the consequences attached to a crime already completed and therefore

change the "quantum of punishment." ' " *Fender v. Thompson*, 883 F.2d at 305-06 (quoting *Weaver v. Graham*, 450 U.S. 24, 33 (1981), and *Dobbert v. Florida*, 432 U.S. 282, 293-94 (1971)).

Though, in this case, Mr. Graham was not denied every opportunity for parole, the rule still changed to make his punishment more burdensome. When sentenced, Mr. Graham was entitled to be considered for parole after seven years and reconsidered annually thereafter. The Board subsequently changed its rules to provide that he need not be reconsidered more frequently than every eight years. There is a substantial difference between mandated reconsideration annually and mandated reconsideration once every eight years. *See Rodriguez v. United States Parole Comm'n*, 594 F.2d 170, 176 (7th Cir. 1979). It is the change in the rules applied after the commission of the crime, after conviction, after sentencing, and after service of a substantial portion of the sentence that violates the ex post facto clause. *See Weaver v. Graham*, 450 U.S. 24, 30-31 (1981).

D. THE ELEVENTH CIRCUIT'S HOLDING THAT THE PAROLE RULE AT ISSUE IS A "LAW" SUBJECT TO THE EX POST FACTO PROVISIONS OF THE UNITED STATES CONSTITUTION DOES NOT CREATE A CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS ADDRESSING THE LEGAL STATUS OF SIMILAR RULES.

The Eighth Circuit's decision in *Bailey v. Gardebring*, 940 F.2d 1150 (8th Cir. 1991) is not in conflict with the Eleventh Circuit's decisions in *Graham* and *Akins* because the decisions are distinguishable on their facts. Petitioner

cites *Bailey* for the broad proposition that regulations governing the exercise of the power to grant or deny parole are not laws within the meaning of the ex post facto clause. However, the holding of the Eighth Circuit that Minnesota's parole regulations were not laws for ex post facto purposes was premised on the conclusion that the decisions of the state agencies to promulgate parole regulations were discretionary decisions. "[N]either [agency] was required by law to issue specific regulations." *Bailey v. Gardebring*, 940 F.2d 1150, 1156.

In contrast, *Graham* and *Akins* address the constitutionality of a change in a rule that the Georgia Board of Pardons and Paroles was required to make. Georgia law mandates that the Board promulgate rules and regulations that " 'contain an eligibility requirement for parole which shall set forth the time when the automatic initial consideration for parole of inmates under the jurisdiction of the Department of Corrections shall take place and also the times at which periodic reconsideration thereafter shall take place.' " *Akins v. Snow*, 922 F.2d 1558, 1561 (quoting O.C.G.A. § 42-9-45 (1989)). The Eleventh Circuit reasoned that the rule that modified the timing of parole reconsideration obviously would have been subject to the ex post facto clause had it been passed by the Georgia legislature. The court concluded that the mandate to the Board to set the time for parole consideration and reconsideration was "quasi-legislative" in nature and, therefore, had the force and effect of law. Thus, the Board lacked the broad discretion with respect to the timing of parole consideration and reconsideration of the agencies whose regulations were at issue in *Bailey*. The cases addressing federal parole guidelines cited in *Bailey* are

likewise distinguishable. *See Bailey v. Gardebring*, 940 F.2d 1150, 1158-59 (Lay, C.J., dissenting).

The Eleventh Circuit's decision in *Graham* and *Akins* also are consistent with decisions of other circuits that have held parole regulations to be laws for purposes of ex post facto clause analysis. *See Yamamoto v. United States Parole Comm'n*, 794 F.2d 1295, 1300-01 (8th Cir. 1986) ("adverse changes in the frequency with which a prisoner may be *considered* for parole or in the time at which a prisoner first becomes *eligible for parole consideration* may also violate the ex post facto clause"); *Royster v. Fauver*, 775 F.2d 527, 534 (3rd Cir. 1985) (holding that parole regulations may be laws for purposes of ex post facto analysis); *Rodriguez v. United States Parole Comm'n*, 594 F.2d 170, 174 (7th Cir. 1979) (administrative rule may be considered an extension of a statute for purposes of the ex post facto clause).

CONCLUSION

This is a simple case that affects a relatively small number of people. In addition to Respondent Graham, those who are affected by the Eleventh Circuit's decision are inmates serving life sentences in the State of Georgia for crimes committed prior to the effective date in 1985 of the amendment to Rule 475-3-.05, paragraph 2 of the Rules of the Georgia Board of Pardons and Paroles. The relief that the State must grant under the Eleventh Circuit's ruling is to provide an opportunity for reconsideration for parole of each such inmate in accordance with the

rule in effect at the time of the crime of which he was convicted. Any inmate serving a life sentence for a crime committed after the effective date of the 1985 rule need be considered no more frequently than every eight years after an initial review and denial.

The decision of the Eleventh Circuit is consistent with this Court's holding in *Collins v. Youngblood,* and with the decisions of other circuit courts. Therefore, it is respectfully submitted that the Petition of Writ of Certiorari should be denied.

Respectfully submitted,

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